BOSCO PHILIP ANTHONY

v.

ELECTRICAL INDUSTRY WORKERS UNION & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' WAN ADNAN BIN ISMAIL J.
[ORIGINATING MOTION NO. R2-25-68-92]
27 OCTOBER 1994

INDUSTRIAL LAW: *Applicant's claim for wrongful dismissal dismissed by Industrial Court - Application for certiorari to quash award of Industrial Court - Allegation of non-compliance with Rules and Constitution of the Union - Alleged breach of the rules of natural justice when decision taken to dismiss applicant - Whether failure of Industrial Court to take these factors into account was an error going into jurisdiction.*

The applicant was the Executive Secretary of the first respondent (the Union). The Union preferred six charges against the applicant and a Panel of Enquiry was set up to investigate the charges. The Panel found the applicant guilty of four of the charges and the Executive Council of the Union took a decision to dismiss the applicant. The applicant's claim that the dismissal was without just cause or excuse was dismissed by the Industrial Court.

In seeking an order of certiorari to quash the decision of the Industrial Court, the applicant contended that the Industrial Court had committed an error going into jurisdiction in failing to take into account, that there was non-compliance of Rule 12 clause 11 of the Rules and Constitution of the Union when the applicant was suspended from duty, in that the letter of suspension was issued by the President and not by the Executive Council, and that there was a breach of the rules of natural justice when the Executive Council took the decision to dismiss the applicant.

Held:

[1] The power to suspend is with the Executive Council whether or not the suspension is a form of punishment. The Constitution of the Union only gives the power to suspend to the Executive Council and nobody else can exercise this power, not even the President. In the circumstances the President was acting *ultra vires* the Rules and Constitution of the Union when he, without the authority of the Executive Council, suspended the applicant from duty. The suspension was consequently void.

[2] There was a breach of the rules of natural justice during the decision-making process by the Executive Council. Amaldass, Vascaran, Lesley Guoh and the complainants Arunasalam and Anandan should not have participated and voted at the meeting of the Executive Council as they were involved in the enquiry.

[3] The fact that there was non-compliance with Rule 12 clause 11 of the Rules and Constitution of the Union and the fact that there was a breach of the rules of natural justice were not considered at all by the learned Chairman of the Industrial Court. These facts are relevant and ought to have been taken into account by the learned Chairman. In the circumstances there was an error going into jurisdiction and this was a proper case for a rehearing before another Chairman.

[Application for orders of certiorari and mandamus granted with costs]

Cases referred to:
Lionel v. Government of Malaysia [1971] 2 MLJ 172 ***(cit)***
Sasa Musa Sugar Works (P) Ltd. Shobrati Khan and Others AIR [1959] SC 923 ***(cit)***
Rohana bte Ariffin & Anor v. Universiti Sains Malaysia [1989] 1 MLJ 487 ***(foll)***

For the plaintiff - K. Nadarajah; M/s. Nadarajah & Partners
For the respondent - Thilakan Ramalingam & Kevin Gregory Danker; M/s. Nahappan, Dorairaj & Danker

JUDGMENT

Wan Adnan bin Ismail J:
By this motion the applicant prays for the following orders:

(i) Satu perintah Certiorari untuk membawa kepada Mahkamah yang Mulia ini bagi tujuan untuk membatalkan award no. 125 tahun 1992 yang dibuat dalam kes Mahkamah Perusahaan no. 3/4-244/88;

(ii) Satu perintah Mandamus dikeluarkan untuk mengarahkan Pendaftar Mahkamah Perusahaan menetapkan pendengaran kes Mahkamah Perusahaan no. 3/4-244/88 di hadapan Pengerusi Mahkamah Perusahaan yang lain.

The applicant was the executive secretary of the first respondent, the Electrical Industry Workers' Union (the union). By letter dated 14 December 1987 the union raised six allegations against him.

They were as follows:

1. That on 27 November 1987, you forcibly removed a Southern Bank cheque no. 110310 for a sum of RM400 which was in the possession of our accounts clerk, Mr. Kuek Hooi Aun.
2. That you invited EIWU members to your house and instigated them to injure the union and made defamatory and scurrilous attacks on the Union Officers and/or the policy of the union.
3. That you removed documents belonging to the union without prior permission of any of the principal officers of the union.
4. That on 9 December 1987, you met our member of the executive council to cause disunity amongst the newly elected members of the executive council of the union.
5. That on 10 December 1987, you were unlawfully in possession of documents and payment vouchers belonging to the union and that on the same date or thereabout, you distributed payment vouchers belonging to the union to one of our executive council member.
6. That on 10 December 1987, at about 2.30 pm you entered the union office whilst you were on annual leave and created a commotion and ugly scene and used abusive and ugly language against the general secretary and further threatened the general secretary to cause bodily harm to him.

Then by letter dated 29 December 1987 he was suspended from duty for a period of 10 days with effect from 4 January 1988. By the same letter he was informed that an enquiry would be held on 7 January 1988. The members of the panel of enquiry were the following:

1. Amaldass s/o Michael - Chairmam.
2. Saseedharan - Member
3. Rashid Karim - Member

The prosecuting officer was Vascaran s/o A. Paniker while Lesley Guoh Ngut Eng was the secretary.

The panel found him guilty of charges no. 1, 2, 4 & 6. On 9 January 1988 the executive council of the union held a meeting whereat a decision was taken to dismiss the applicant. Those who attended the meeting were the following:

1.	Abdul Manab B Md Kassim	President
2.	Amaldass s/o Michael	Vice President
3.	Arulnasalam P	General Secretary
4.	Abdol Rahman Othman	Asst. General Secretary
5.	Vascaran A Paniker	Treasurer
6.	Lesley Guoh Ngut Eng	Member
7.	Ranjit Kaur	Member
8.	Anandan Lingam	Member
9.	Zulkarnain Aziz	Member
10.	Mohd Iddrus Samsuddin	Member
11.	Vijayakumar M V Raghavan	Member
12.	Tan Yan Chew	Member

By letter dated 11 January 1988 the applicant was dismissed with effect from the same day. On reference by the Honourable Minister of Human Resources the applicant's claim that the dismissal was without just cause or excuse was dismissed by the Industrial Court.

The first point that was raised before me was that there was non-compliance of r. 12 clause 11 of the Rules and Constitution of the Union when the applicant was suspended from duty with effect from 4 January 1988. The second point was that there was a breach of the rules of natural justice when the executive council took the decision on 7 January 1988 to dismiss the applicant. It was submitted by the learned Counsel for the applicant that since the Industrial Court had failed to take into account these relevant factors the Court had committed an error going into jurisdiction.

Non-Compliance of Rule 12 Clause 11

Rule 12 clause 1 reads as follows:

> Rule 12 - Executive Council:
>
> (1) The government of the Union and the conduct of its business, including trade disputes, in the period between triennial general meetings shall be vested in an Executive Council.

The provision of clause 11 is as follows:

> (11) The Executive Council shall give instructions to the General Secretary and other officers of the Union for the conduct of the affairs of the Union. It may, subject to the provisions of Rule 11, paragraph 3, employ such persons as it deems necessary to carry on the day-to-day administration of the Union and fix their remuneration. It may suspend or dismiss any officer or member of the staff for neglect of duty, dishonesty, incompetence refusal to carry out the decisions of the Executive Council, or for any other reason which it deems good and sufficient in the interest of the Union.

It was the contention of the applicant that the suspension was not made in accordance with the provision of this clause in that the order for suspension was not made by the council but was made personally by the president of the union. The president wrote the letter of suspension. He did not convene the meeting of the executive council. He suspended the applicant from duty on his own volition without the authority of the executive council. The suspension was *ultra vires* the constitution and therefore void.

The case of *Lionel v. Government of Malaysia* [1971] 2 MLJ 172 was cited as the authority. In this case the Federal Court held that as the authority to dismiss the appellant was with the public services commission, the act of the chief police officer in dismissing the appellant was contrary to the constitution and therefore void.

The learned Counsel for the union however contended that the suspension under r. 12 clause 11 only envisages suspension as a form of punishment. The rule does not contemplate a suspension prior to an enquiry. In this case it was a suspension prior to an enquiry. The suspension was with full pay. Therefore the suspension did not require the authority of the executive council. The president nevertheless consulted the members of the council before he issued the suspension letter.

The Indian case of *Sasa Musa Sugar Works (P) Ltd. v. Shobrati Khan and Others* AIR [1959] SC 923 was referred to me. In that case it was held that as the suspension was an interim measure pending an enquiry the suspension was not a punishment.

I agree with this proposition. But the question before me is different. The question is not whether the suspension amounted to a punishment or not but rather whether the president of the union had the power to suspend the applicant from duty.

I cannot agree with the learned Counsel that the power given to the executive council to suspend an employee under rule 12 clause 11 only refers to a power to suspend when the suspension is meant to be a form of punishment. The clause does not say so. To my mind the power to suspend is with the executive council whether or not the suspension is a form of punishment. The constitution only gives the power to suspend to the executive council. Nobody else can exercise that power. Not even the president. The president or any other office bearer will only have such powers as are given to him by the constitution. The duties of the principal officers of the Union are specified in r. 13. The duties of the president are in clause (1) which states as follows:

> 1) The president shall during his term of office preside at all general meetings and all meetings of the executive council and shall be responsible for the proper conduct of all such meetings. He shall have a casting vote, and he shall sign the minutes of each meeting at the time they are approved. He shall, in conjunction with the general secretary and the treasurer, sign all cheques on behalf of the union, superintend the general administration of the affairs of the union, and endeavour to secure the observance of the rules by all concerned.

Rule 8 provides as follows:

> Rule 8 - Constitution & Government
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> (1) The supreme authority of the union shall be vested in a general meeting except in respect of matters on which decisions shall be taken only by secret ballot in accordance with r. 25.
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> (2) Subject to the foregoing provision, the union shall be governed by the executive council.

Rule 12 sets out the functions of the executive council. Clause 5 sets out the procedure to be taken when an immediate decision of the executive council is necessary.

> (5) When any matter requiring the immediate decision of the executive council arises and it is not possible or convenient to convene an emergency meeting, the general secretary may, with the approval of the president, obtain a decision by means of a circular letter. The following conditions must be fulfilled before a decision of the executive council is deemed to have been obtained:
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> (a) The issue and proposed action must be clearly set out in the circular, and copies of the circular must be forwarded to all members of the executive council;

(b) At least one-half of the members of the executive council must indicate in writing whether they are in favour or against the proposal; and

(c) The decision must be by a majority of those who have thus indicated.

It is clear from these provisions that no power is given to any individual office bearer.

In the circumstances I find that the president was acting *ultra vires* the rules and constitution of the union when he without the authority of the executive council suspended the applicant from duty. The suspension was consequently void.

Breach of Rules of Natural Justice

The learned Counsel for the applicant submitted that there was a breach of the rules of natural justice at the time the executive council considered the report of the panel of enquiry and took the decision to dismiss the applicant. This is because Amaldass s/o Michael, the chairman of the panel of enquiry also attended the meeting and participated thereat although he did not vote. Vascaran s/o A Paniker and Lesley Guoh Ngut Eng the prosecuting officer and secretary respectively at the enquiry participated at the meeting and voted for the dismissal of the applicant. The secretary general of the union, Arunasalam P the main complainant at the enquiry also participated at the meeting and voted for the dismissal. Another complainant at the enquiry Anandan Lingam also participated and voted for the dismissal.

These facts are not in dispute.

As an authority the case of *Rohana bte Ariffin & Anor v. Universiti Sains Malaysia* [1989] 1 MLJ 487 was cited to me. In this case the applicants had applied for an order of certiorari to quash the decision of the university council dismissing their appeals from the decision of the disciplinary authority of the university. It was argued that the proceedings before the disciplinary authority were contrary of natural justice owing to the presence of Mr. NA Ogle, the registrar of the respondent university, the secretary of the disciplinary authority, the secretary of the university council and the complainant in the case of both the applicants, during the disciplinary authority's deliberations.

The application was allowed. It was held that the proceedings before the disciplinary authority were contrary of natural justice owing to the presence of the registrar during the disciplinary authority's deliberations. The learned Counsel for the union however submitted that as Vascaran and Lesley Guoh were not members of the panel of enquiry they were not disqualified from participating and voting at the meeting. At the enquiry they did not take part in the decision-making of the panel. He also said that there was no evidence that Amaldass had influenced the members of the executive council. Amaldass refrained from making comments and he did not vote. He further stated that since the result of the voting was, 9 voted for dismissal, 2 voted against and 1 abstained there were still more votes for dismissal even if the votes of the complainants (Arunasalam and Anandan) were not counted.

I agree with the learned Counsel for the applicant that there was a breach of the rules of natural justice during the decision-making process by the executive council. Amaldass, Vascaran, Lesley Guoh and the complainants Arunasalam and Anandan should not have participated and voted at the meeting of the executive council. They were involved at the enquiry. Certiorari is not concerned with the decision but rather with the decision-making process. In *Rohana's* case Mr. Ogle was only present with the members of the disciplinary

authority during their deliberations and decision. He did not discuss the case with the members of the disciplinary authority nor did he take part in the deliberations.

The fact that there was non-compliance with r. 12 clause 11 of the Rules and Constitution of the union and the fact that there was a breach of the rules of natural justice were not considered at all by the learned Chairman of the Industrial Court. These facts are relevant and ought to have been taken into account by the learned Chairman. I find that there was an error going into jurisdiction. I also find that this is a proper case for a rehearing before another Chairman. I therefore granted both the order of certiorari and mandamus as prayed and costs.